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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 555

In the Matter of
GAYNE SALES CO., INC., a corporation,
Bankrupt.

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a corporation, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Subject Index

	Page
Jurisdiction	3
Question presented	3
Statute involved	3
Statement	4
Reasons for denying the writ	6
Argument	6
I. The decision below is manifestly correct	6
II. There is no conflict among the courts of appeals on the question involved	14
III. The instant decision correctly construes Title 11, U. S. C., Chapter 4, Section 47 and is in accord with the construction given such section by other courts of appeals	19
IV. There has been no hearing of the issues of fact or matters of law in the lower court	20
Conclusion	21

Table of Authorities Cited

Cases

Pages

Arkansas Corporation Commission v. Thompson, 116 F. 2d 179 13

Cohen v. Eleven West 42d Street, Inc., 115 F. 2d 531 13
Columbia Foundry Co. v. Lochner, 179 F. 2d 630 13

Delatour v. Meredith, 144 Fed. 2d 594 10

Federal Land Bank v. Hansen, 113 F. 2d 82 12

Goldie v. Carr, 130 F. 2d 335 13

Hoehn v. McIntosh (6 C.A.) 110 F. 2d 199 11

In re Christ's Church of the Golden Rule, 172 F. 2d 523 ... 13
In re Federal Photo Engraving Corporation (2 C.A.) 54 F. 2d 628 15
In re Leigh, 139 F. 2d 386 12
In re Manufacturers Trading Corporation (6 C.A.) 194 F. 2d 948 ..... 9, 10

Kelso v. McLaren (8 C.A.) 122 F. 2d 867 17

Lieberman v. Bancroft (3 C.A.) 69 F. 2d 202 15

Pearson v. Higgins, 34 F. 2d 27 .....13, 18, 19, 20

Theard v. Fidelity & Deposit Co. of Maryland (5 C.A.) 202 F. 2d 880 10

Universal Oil Products Co. v. Cosden Petroleum Corp. (5 C.A.) 178 F. 2d 495 16

Codes

11 United States Code:
Section 47, Chapter 4 .....3, 6, 7, 13, 14, 19, 20
Section 47(a) 13

Texts

Collier on Bankruptcy (14th Ed.), Volume 2, pages 715-716 7

Remington on Bankruptcy, Volume 8, paragraph 3429, page 323 ..... 8, 10

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On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Morris Trieber has filed a petition requesting that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, which judgment, affirming an order of the

United States District Court for the Northern District of California, Southern Division, was entered on September 5, 1956. A petition for rehearing was denied on October 8th, 1956. The opinion of the Court of Appeals is reported in 237 Fed. 2d 117, and appears in Commerce Clearing House, Inc. Bankruptcy Law Reporter (4th ed.) par. 58,825.

The controversy arose in the bankruptcy proceedings of Gayne Sales Co., Inc., a corporation, bankrupt, in the United States District Court for the Northern District of California, Southern Division, and the first order and decision was entered by the Honorable Burton J. Wyman, a Referee in Bankruptcy of the said Court, at San Francisco, California, on January 10, 1956. His decision and judgment is unreported, but is contained in the Transcript of Record on pages 43 and 44. Morris Trieber filed a petition to review the decision. The trustee filed a motion with the United States District Court for the Northern District of California, Southern Division, to dismiss the petition for review and to remand the cause to the Bankruptcy Referee for a hearing on the merits on the ground that the decision and judgment of the Referee in Bankruptcy dated January 10, 1956 was interlocutory and not a final order. An order was made and entered on April 11, 1956 by the Honorable O. D. Hamlin, United States District Judge, granting the motion to dismiss the petition of Morris Trieber for review and remanding the cause to the Referee for a hearing on the merits. His order is unreported and is contained in the Transcript of Record on pages 52 and 53. Morris

Trieber appealed from said order of the District Court to the United States Court of Appeals for the Ninth Circuit. The trustee moved to dismiss the appeal upon the ground that the order of the District Court was interlocutory, and the Circuit Court granted the motion to dismiss the appeal of Morris Trieber reported in 237 F.(2d) 117.

JURISDICTION.

Petitioner Morris Trieber invokes the jurisdiction of this Court under Title 11, U.S.C., Ch. 4, §47.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in dismissing an appeal from an interlocutory order of the District Court made in a controversy arising in a proceeding in bankruptcy granting a motion to dismiss a petition to review an order of a Bankruptcy Referee overruling an objection to his summary jurisdiction to hear an objection to a proof of claim and petition for turnover order?

STATUTE INVOLVED.

The statute involved in this case is Title 11, Ch. 4, §47 of the United States Code.

> (a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held,

are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

STATEMENT.

This controversy arises out of the proceeding of Gayne Sales Co., Inc., a corporation, bankrupt, which said corporation was adjudicated a bankrupt on August 24, 1954. Thereafter, the bankruptcy proceeding was referred to a Referee in Bankruptcy and Morris Trieber, the petitioner, filed his proof of claim (Tr. p. 4-8) with the Referee in Bankruptcy. John O. England, the respondent, as trustee of the estate

of the bankrupt corporation, filed his objection (Tr. p. 8-15) to the allowance of said proof of claim, and incorporated in his objection to said proof of claim a petition for a turnover order. Petitioner filed his Answer and Return (Tr. p. 20-42) to the objection of respondent to his proof of claim and petition for turnover order. In his Answer and Return petitioner objected to the summary jurisdiction of the Bankruptcy Referee, and after a hearing *only on the question of jurisdiction,* his plea objecting to the summary jurisdiction was overruled by the Bankruptcy Referee. (Tr. p. 43-44.) Thereafter, petitioner filed his petition to review (Tr. p. 44-52) the order of the Bankruptcy Referee overruling objection of petitioner to the summary jurisdiction of the Bankruptcy Court. Respondent filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, his notice of motion to dismiss said petition for review and to remand the cause for further hearing to the Bankruptcy Referee. The District Court granted the motion of the respondent to dismiss the petition for review of petitioner and the proceeding was remanded to the Bankruptcy Referee for further hearing. (Tr. p. 52-53.) Petitioner filed a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and respondent moved the Court of Appeals to dismiss the appeal upon the ground that the order of the District Court was interlocutory in nature and made in a controversy arising in proceedings in bankruptcy. The Circuit Court of Appeals granted the motion of respondent to dismiss the appeal of petitioner. (See 237 F.(2d) 117.)

A petition for rehearing was thereafter denied by the Court of Appeals for the Ninth Circuit. (Appendix to Petition for Writ of Certiorari p. iv.)

REASONS FOR DENYING THE WRIT.

I. The decision below is manifestly correct.

II. There is no conflict among the Courts of Appeals on the question involved.

III. The instant decision correctly construes Title 11, U.S.C., Ch. 4, §47 and is in accord with the construction given such section by other Courts of Appeals.

IV. There has been no hearing of the issues of fact or matters of law in the lower Court.

ARGUMENT.

I.

THE DECISION BELOW IS MANIFESTLY CORRECT.

The appellate jurisdiction of Courts of Appeals in bankruptcy cases includes interlocutory or final orders in proceedings in bankruptcy, but only *final orders in controversies arising in proceedings in bankruptcy.* Before entering into a discussion of and citing authorities in support of the reasons for denying the writ of certiorari, and before proceeding to answer Part I of the petition of Morris Trieber, respondent respectfully directs attention to the absence of the words "in their respective jurisdictions in proceedings in

bankruptcy" following the word "bankruptcy," in line 5 of §47, Title 11, Ch. 4, U.S.C., on page 23 of the petition. Petitioner contends, on page 24 of his petition, that since §47, Title 11, Ch. 4, U.S.C. was amended in 1938, there is no longer any distinction between "proceedings" and "controversies" in bankruptcy. His argument is clearly refuted by the following excerpt from Vol. 2, Collier on Bankruptcy (14th Ed.) pages 715-716:

> "Thus the distinction between 'proceedings in bankruptcy' and 'controversies arising in proceedings in bankruptcy' continues to be important where an interlocutory order or decree is involved. If Congress had intended that there could be appeals generally from interlocutory orders in 'controversies', as distinguished from 'proceedings', it could have easily done so in either of two ways: (1) by placing the phrase 'either interlocutory or final' before the words 'in proceedings in bankruptcy' so that the phrase would modify 'in proceedings in bankruptcy . . . and in controversies arising in proceedings in bankruptcy'; or (2) by providing that the appellate courts 'are hereby invested with appellate jurisdiction . . . to review, affirm, revise or reverse either interlocutory or final judgments or orders, both in matters of law and in matters of fact', etc. Congress did neither. Instead, it inserted the phrase 'either interlocutory or final' where, on ordinary principles of grammar, it can only modify 'in proceedings in bankruptcy.'"

While both interlocutory and final orders in *proceedings in bankruptcy* are appealable, only final orders *in*

controversies arising in proceedings in bankruptcy are appealable. The Court of Appeals, in its Opinion reported in 237 F.(2d) 117, held the order of the District Court was not appealable, being interlocutory in nature, having been made *in a controversy arising in proceedings in bankruptcy,* and said on page 118:

> "It was therefore an order made in a controversy arising in proceedings in bankruptcy, as that is used in 11 U.S.C.A. §47(a). See In re Christ's Church of the Golden Rule, 172 F. (2d) 523. The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order. In re Christ's Church of the Golden Rule, supra.
>
> The motion to dismiss the appeal is ordered granted."

The District Court, in its order, (Tr. 52-53) also held that the order of the Bankruptcy Referee was interlocutory and not final and remanded the cause to the Referee *for a hearing on the merits.* There has never been a hearing on the issues raised by the objection of the trustee and his petition for turnover order and the answer of petitioner thereto. The order of the Bankruptcy Referee (Tr. 43-44), overruling the objection of petitioner to summary jurisdiction, was of a purely preliminary nature in advance of actual judicial action; no definite determination of rights was made either by the order of the Bankruptcy Referee or the District Court, and the following excerpt from Vol. 8, Remington on Bankruptcy, par. 3429, page 323 is indeed in point:

> "It has always been the position of reviewing courts that they will decline to take cognizance of an application for review of a ruling *making no definitive determination of rights, and the same view is still taken,* notwithstanding statutory appealability of interlocutory orders."

Appellant cites a number of cases on pages 26 to 34 which relate only to the appealability of either interlocutory or final orders *in proceedings in bankruptcy.* Since the interlocutory order of the District Court, in the pending matter, relates to *a controversy arising in a proceeding in bankruptcy,* the cases cited by petitioner are not applicable. Before proceeding to briefly comment upon some of the cases cited by petitioner, respondent respectfully directs the attention of this Honorable Court to an excerpt from *In re Manufacturers Trading Corporation,* (6. C.A.) 194 F. 2d 948 wherein the Circuit Court of Appeals states that not every order, even *in a proceeding in bankruptcy,* is appealable, and on page 953 the Court said:

> "Although Title 11 U.S.C.A. Sec. 47, sub. a, grants an appeal from interlocutory orders in proceedings in bankruptcy, *this does not mean that every order entered in the course of the proceedings is appealable.* Due regard for the efficiency of the administration and dispatch of the proceedings *necessitates a common-sense interpretation of the above provision of the statute in order that the right to appeal be limited within reasonable bounds.* Collier on Bankruptcy (14th Ed.), Vol. 2, Section 24.39. *'Before reviewable,* administrative orders (in bankruptcy) must have *a certain degree of finality.* The salutary pur-

> pose of the legislation would be destroyed if every order, no matter how trivial, were subject to review.' Hoehn v. McIntosh, 6 Cir., 110 F. 2d 119. See also In re Pechin, 3 Cir., 227 F. 853." (Italics added.)

Even assuming for the purpose of argument only that the order of the District Court is an interlocutory order in a proceeding in bankruptcy, nevertheless, as stated in the excerpt from *In re Manufacturers Trading Corporation,* supra, before being reviewable, the order of the District Court must have a certain degree of finality, and as stated in Vol. 8 of Remington on Bankruptcy, Par. 3429, page 323, supra, there must be a *definitive determination of rights.* The order of the District Court (Tr. 52-53) merely granted a motion to dismiss a petition for review of an interlocutory order of the Bankruptcy Referee overruling an objection of petitioner to jurisdiction.

In some of the cases cited by petitioner, the Circuit Courts of Appeals comment upon the necessity of an order being appealed from making some *definitive determination of rights.* In *Theard v. Fidelity & Deposit Co. of Maryland,* (5 C.A.) 202 F. 2d 880 at 882 the Court said:

> "It may be that such appellate jurisdiction does not extend to interlocutory orders which are *mere incidents in the inquiry and determine nothing.* See In re Hotel Governor Clinton, Inc., 2 Cir., 107 F. 2d 398." (Italics added.)

The Second Circuit Court of Appeals in *Delatour v. Meredith,* 144 Fed. 2d 594, cited by petitioner, also

indicates that an order to be appealable must have finality, as shown by the excerpt from its opinion on pages 595-596 as follows:

> ". . . and this order is surely of enough substance, denying as it does appellants' rights to communicate with other security holders without censorship by the court, to distinguish it from the few exceptions to the general rule of appealability, limited as they are *to orders of a purely preliminary nature in advance of actual judicial action.* See In re Hotel Governor Clinton, 2 Cir., 107 F. 2d 398; Federal Land Bank of Springfield v. Hansen, 2 Cir., 113 F. 2d 82, 84, 85." (Italics added.)

Petitioner also cites *Hoehn v. McIntosh* (6 C.A.) 110 F. 2d 199, wherein the Court also comments upon the necessity of administrative orders having a degree of finality and on page 201 the Court said:

> "The Statute, as it existed prior to the amendment, has been considered in numerous decisions, the rationale of which is that appeals from purely intermediate and preliminary orders should be allowed only in exceptional cases. So far as is material to the question under consideration, the amendment made no change in the law. *Before reviewable, administrative orders must have a certain degree of finality.* The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, *unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that*

> *rights may be definitely determined by review.* Tringale Electric Company v. Foutch, 8 Cir., 40 F. 2d 353; Board of Road Comr's v. Keil, 6 Cir., 259 F. 76; *In re Fox West Coast Theatres,* 9 Cir., 88 F. 2d 212; In re Throckmorton, 6 Cir., 196 F. 656." (Italics added.)

Petitioner, on pages 28-29, cites excerpts from *In re Leigh,* 139 F. 2d 386 which is a case involving an appeal, as the facts disclose, from an order in a *proceeding in bankruptcy* and not in a *controversy arising in a proceeding in bankruptcy.* Consequently, the italicized excerpt at the bottom of page 28 that the Bankruptcy Act permits an appeal as of right from all interlocutory and final orders, can only encompass orders in a *proceeding in bankruptcy* in keeping with the factual situation upon which the Court based its decision.

In the quotation from *Federal Land Bank v. Hansen,* 113 F. 2d 82, on page 30, there is to be found the following language of the Court:

> "Even in bankruptcy, various interlocutory orders *which determine nothing,* such as orders merely of reference for report, *are not reviewable* and appeals will be accordingly dismissed." (Italics added.)

Respondent respectfully submits that the above quoted excerpt from the decision cited by petitioner is applicable to the interlocutory order of the District Court (Tr. p. 52-53), *which determined nothing,* dismissing the petition to review the Referee's interlocu-

tory order and remanding the matter for a hearing before the Referee on the merits.

Petitioner, on pages 30 and 31, erroneously criticizes the decision of the Court of Appeals for the Ninth Circuit in the cases of *Pearson v. Higgins,* 34 F. 2d 27 and *Goldie v. Carr,* 130 F. 2d 335, and its 1949 decision *In re Christ's Church of the Golden Rule,* 172 F. 2d 523, although not mentioning the latter case by name. Petitioner states, on pages 31 and 32 that the Circuit Court erred in its decision in the *Goldie v. Carr* case, supra, in holding that an interlocutory order in a controversy arising in a proceeding in bankruptcy is not appealable and that the Court's "language directly contradicts the plain provisions of §47(a) itself", and "must have been inadvertently used". (Lines 29-30, p. 31 and line 3, p. 32.) Petitioner's statement that §47(a) makes interlocutory orders appealable whether made in a *controversy* in bankruptcy or in a *proceeding* in bankruptcy" (line 32, p. 31 and lines 1-2, p. 32) conflicts with the plain provisions of §47(a) that only *final orders* are appealable in a *controversy in bankruptcy.* It is, therefore, submitted that the comments of petitioner on the rulings of the Circuit Court in *Goldie v. Carr* supra, are not well-founded.

The facts in the *Arkansas Corporation Commission v. Thompson,* 116 F. 2d 179, *Cohen v. Eleven West 42d Street, Inc.,* 115 F. 2d 531, and *Columbia Foundry Co. v. Lochner,* 179 F. 2d 630 cases on pages 31-34 of petitioner's brief disclose appeals from interlocutory orders made in a *proceeding in bankruptcy* and

do not relate to *controversies arising in proceedings in bankruptcy.* The lack of any factual similarity does not necessitate any further comment.

It is respectfully submitted that the decision below of the Court of Appeals for the Ninth Circuit is manifestly correct. It affirmed an interlocutory order *in a controversy arising in proceedings in bankruptcy,* and such an order of the District Court is not appealable under the provisions of Title 11, U.S.C., Ch. 4, Par. 47. The order of the District Court only decided an intervening matter pertaining to the proceeding pending before the Referee in Bankruptcy and remanded the matter to the Referee in Bankruptcy in order that he might proceed to adjudicate the cause on the merits. The decision of the Court of Appeals for the Ninth Circuit held that the order of the District Court was concedely interlocutory in nature and that the Circuit Court lacked jurisdiction to review the order. It is therefore evident that the decision of the Court of Appeals for the Ninth Circuit is manifestly correct and it denied a petition for a rehearing of its order.

II.

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION INVOLVED.

Petitioner states on page 22 of his petition that the Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals. Respondent respectfully directs the attention of this Court to the decisions of the

Court of Appeals for the Second, Third, Fifth and Eighth Circuits which held that interlocutory orders in controversies arising in proceedings in bankruptcy are not appealable. Consequently, there is no conflict between these decisions of the other Circuits with the decision of the Court of Appeals for the Ninth Circuit from which petitioner prays for the issuance of a Writ of Certiorari. Respondent will briefly discuss the decisions of the other Circuit Court of Appeals.

In the case of *In re Federal Photo Engraving Corporation,* (2 C.A.) 54 F. 2d 628 the District Court reversed an order of the Bankruptcy Referee sustaining an objection to his summary jurisdiction to hear a petition of a bankruptcy trustee for a turnover order. The Circuit Court dismissed an appeal from the interlocutory order of the District Court and on page 629 said:

> "A determination of the existence of summary jurisdiction, such as the District Judge made in the present case without passing on the merits, is not a final order. *The rights of appellant are not finally adjudicated until the referee has denied relief to the receiver or entered a so-called 'turn-over order' against the appellant. In re Russell* (C.C.A.) 101 F. 248; *In re Rose Shoe Mfg. Co.* (C.C.A.) 168 F. 39; *Pearson v. Higgins,* (C.C.A.) 34 F. 2d 27, certiorari denied 280 U.S. 593, 50 S. Ct. 39, 74 L. Ed. 641; *Seattle Curb Exchange v. Knight* (C.C.A.) 46 F. 2d 34." (Italics added.)

In *Lieberman v. Bancroft,* (3 C.A.) 69 F. 2d 202 an appeal to the Circuit Court was taken from a Dis-

trict Court order refusing to vacate its interlocutory decree directing an ancillary receiver of the bankrupt corporation to turn over assets to the bankruptcy trustees. A motion of appellees to dismiss the appeal was granted, and on pages 205-206 the Court said:

> "The appellees have moved to dismiss the appeal on the ground, inter alia, that this court has no jurisdiction. They allege that the decree is an interlocutory order which does not settle any of the rights of the appellants and is not a final order within the meaning of 11 USCA § 47." . . .
>
> The order of the District Court does not purport to make a final determination of the rights of the bankrupt estate and of Frank & Seder Company in the two Pennsylvania stores. Should a receiver be appointed or a trustee elected for Frank & Seder Company, that issue may still be raised by appropriate pleadings. *Tested by these standards, the decree is interlocutory, and the appeal, being premature, must be dismissed.*" (Italics added.)

In *Universal Oil Products Co. v. Cosden Petroleum Corp.*, (5 C.A.) 178 F. 2d 495, a challenge to its summary jurisdiction was rejected by the District Court. Following an appeal of the interlocutory order in a controversy arising in proceedings in bankruptcy to the Circuit Court, a motion to dismiss the appeal was made. In granting the motion, the Court said on pages 496-497:

> "Appellees, pointing out that the order sought to be appealed from is not a final order but an interlocutory order in a 'controversy arising in

proceedings in bankruptcy', have moved to dismiss the appeal.

Appellants, not at all denying appellee's premise that the appeal ordered was issued in a controversy arising in proceedings in bankruptcy and is interlocutory, insist that under Sec. 24, sub. a, of the Bankruptcy Act. 11 U.S.C.A. § 47, sub. a, the order, though interlocutory, is appealable.

We do not think so. Read in its own light in the light of the authorities cited and relied on by appellees, we think it quite clear that the invoked section permits appeals from interlocutory orders only where they are issued in 'proceedings in bankruptcy' *and that it does not permit appeals from such orders issued, as here, "in controversies arising in proceedings in bankruptcy."* (Italics added.)

The facts in *Kelso v. McLaren,* (8 C.A.) 122 F. 2d 867 relate to an appeal of an interlocutory order of the District Court affirming on review the order of a Bankruptcy Referee denying a motion challenging his summary jurisdiction to hear a petition of a bankruptcy trustee for a turnover order. The Circuit Court granted the motion to dismiss the appeal and said on page 869:

"It is clear that the proceeding instituted by the trustee presented a 'controversy arising in a proceeding in bankruptcy' as distinguished from an administrative 'proceeding in bankruptcy'. 11 U.S.C.A. §§46 and 47. . . . At this time the appeal must be dismissed upon the motion of the trustee *because the determination of*

> *the existence of summary jurisdiction, such as was made in this case without passing upon the merits, is not a final order, and is not appealable.* Section 24, sub. a, of the Bankruptcy Act, as amended by the Act of June 22, 1938, 11 U.S.C.A. § 47, sub. a, provides for appeals '. . . in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and matters of fact.' *Under this section appeals in 'controversies' may be taken to this court from final orders only.* Goldie v. Carr, 9 Cir., 116 F. 2d 335; Hoehn v. McIntosh, 6 Cir., 110 F. 2d 199; Stein v. Elizabeth Trust Co., 3 Cir., 104 F. 2d 777, 779, Lieberman v. Bancroft, 3 Cir., 69 F. 2d 202, 205; Triangle Electric Co. v. Foutch, 8 Cir., 40 F. 2d 353; Pearson v. Higgins, 9 Cir., 34 F. 2d 27; In re Federal Photo Engraving Corporation, 2 Cir., 54 F. 2d 628." (Italics added.)

In *Pearson v. Higgins,* (9 C.A.) 34 F. 2d 27 the Court of Appeals for the Ninth Circuit held that an order overruling an objection to jurisdiction was an unappealable order, and said on page 28:

> "Manifestly, therefore, the appeal is premature. *In an ordinary case at law or in equity, an order overruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding.* Appellants could have no real grievance unless and until the referee entered a turnover order. *After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain.* Appellate courts do not

sit to anticipate possible grievances or to try out controversies in piecemeal.

The appeal will therefore be dismissed without prejudice to any question of jurisdiction or upon the merits; costs to appellee." (Italics added.)

A Petition for Writ of Certiorari was filed with this Honorable Court and the Petition was denied. (280 U.S. 593, 50 S. Ct. 39, 74 L. ed. 641.)

Respondent respectfully submits that the decisions of the above-cited Second, Third, Fifth and Eighth Circuit Court of Appeals show that there is no conflict with the decision of the Court of Appeals for the Ninth Circuit for which the issuance of a Writ of Certiorari is prayed. Furthermore, this Court has had for consideration the issuance of a Writ of Certiorari in the decision of the Court of Appeals for the Ninth Circuit in *Pearson v. Higgins* supra, and as above stated, this Court denied a petition for the issuance of a writ.

III.

THE INSTANT DECISION CORRECTLY CONSTRUES TITLE 11, U. S. C., CH. 4, §47 AND IS IN ACCORD WITH THE CONSTRUCTION GIVEN SUCH SECTION BY OTHER COURTS OF APPEALS.

The Court of Appeals held that the District Court order was interlocutory in nature and was made in a *controversy in proceedings in bankruptcy.* Such an order is not appealable under the provision of Title

11, U.S.C. Ch. 4, §47 supra, which only permits appeals from interlocutory or final orders *in proceedings in bankruptcy.* The Circuit Court did not err in its decision granting the motion to dismiss the appeal from the District Court interlocutory order, and correctly construed Title 11, U.S.C., Ch. 4, §47 supra. The decision is in accord with the decisions of Courts of Appeals for the Second, Third, Fifth and Eighth Circuits, supra, and this Honorable Court refused to issue a Writ of Certiorari in *Pearson v. Higgins,* (9 C.A.) supra, having a factual similarity to the pending matter.

IV.

THERE HAS BEEN NO HEARING OF THE ISSUES OF FACT OR MATTERS OF LAW IN THE LOWER COURT.

Before briefly discussing the above topic, some comment should be made of the subject matter of Parts II and III of the Petition of petitioner. He contends that a Bankruptcy Court lacks jurisdiction of a controversy between a bankruptcy trustee and one *not a party to the proceeding.* Also, that a Bankruptcy Referee and a District Court are without jurisdiction to make a turnover order. His arguments, however, are of no force or effect since he is a *party to the proceeding* by having filed his proof of claim (Tr. pages 4-8) with the Bankruptcy Referee. Having thus submitted himself to the jurisdiction of the Bankruptcy Court, his arguments and cases cited in Parts II and III of his Petition are not in point.

Parts IV and V of his Petition relate to his defenses of the Statute of Limitations and Res Adjudicata. Since there has been no hearing of the issues of fact or matters of law before the Bankruptcy Referee, petitioner will have the opportunity to submit his defenses and authorities to the Bankruptcy Referee at the hearing of the objection of the trustee to the Proof of Claim and Petition for Turnover order, pursuant to the order of the District Court (Tr. 52-53) remanding the cause to the Bankruptcy Referee for a hearing on the merits.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition of Morris Trieber for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
December 1, 1956.

Respectfully submitted,
HERBERT L. FAULKNER,
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JAMES M. CONNERS,
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Subject Index

	Page
I. The dismissal of petitioner's appeal by the Court of Appeals ignores the specific provisions of the statute..	2
II. The statement in respondent's brief that there is no conflict among the Courts of Appeals on the question involved is inaccurate	5
III. The writ should be granted for the reason that under a long line of decisions neither the referee nor the District Court had any jurisdiction to make the turnover order sought by the referee	7
Conclusion	8

Table of Authorities Cited

Cases	Pages
Arkansas Corporation Commission v. Thompson, 116 Fed. (2d) 179	6
Cohen v. Eleven West 42nd Street, Inc., 115 Fed. (2d) 531	6
Cline v. Kaplan, 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97	7
Columbia Foundry Co. v. Lochner, 179 Fed. (2d) 630, 14 A.L.R. (2d) 1349	6, 8
Galbraith v. Vallely, 256 U.S. 46, 41 S.Ct. 415, 65 L.Ed. 823	7
Goldie v. Carr, 130 Fed. (2d) 335	6
In re Christ's Church of the Golden Rule, 172 Fed. (2d) 523	6
In re Luma Camera Service, 157 Fed. (2d) 951	7
Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 82 L.Ed. 476	7
Pearson v. Higgins, 34 Fed. (2d) 27	5
Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770	7

Statutes

11 U.S.C.A., Section 47, subdivision (a)	3

Texts

8 Remington on Bankruptcy 323	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 555

MORRIS TRIEBER,
Petitioner,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of GAYNE SALES Co., INC., a corporation, Bankrupt,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

To Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner feels constrained to file a timely reply to respondent's brief in opposition to his petition for a writ of certiorari on file herein, despite the

full statement of the case and the extensive argument on the questions involved which the petition sets forth.

The purpose of this reply is to refute certain palpably incorrect statements of both law and fact appearing in respondent's brief and to direct attention to the omission of respondent to make any answer whatsoever to what we consider almost compulsory reasons for the granting of the writ.

I.

THE DISMISSAL OF PETITIONER'S APPEAL BY THE COURT OF APPEALS IGNORES THE SPECIFIC PROVISIONS OF THE STATUTE.

Commencing at page 6 of the brief of respondent it is argued by counsel that "since the interlocutory order of the district Court, in the pending matter, relates to *a controversy arising in a proceeding in bankruptcy,* the cases cited by petitioner are not applicable." In the *per curiam* opinion of the Court of Appeals a similar statement is made:

> "The order was entered in connection with a dispute between the trustee and an adverse claimant, concerning the right and title to the bankrupt estate. It was therefore an order made in a controversy arising in proceedings in bankruptcy, as that term is used in 11 U.S.C.A. No. 47(a). See *In re Christ's Church of the Golden Rule,* 172 F. (2d) 523. The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order. *In re Christ's Church of the Golden Rule, supra.*"

Now we submit that the plain provisions of the statute give the right of appeal from interlocutory orders whether made in proceedings in bankruptcy or in controversies arising in proceedings in bankruptcy.

We quoted the statute in *haec verba* in the district Court and in the Court of Appeals and in the petition for a writ of certiorari addressed to this Honorable Court, but the two lower Courts and the respondent as well seem to have been utterly oblivious to the meaning of plain English words. We again quote subdivision (a) of Section 47, Title 11, U.S.C.A.:

> "The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy, *either interlocutory or final,* and *in controversies arising in proceedings in bankruptcy,* to review, affirm, revise, or reverse, both in matters of law and in matters of fact, etc."

Yet in the face of this plain and unambiguous language, the Court of Appeals has held and counsel still argue that only final controversies arising in proceedings in bankruptcy are appealable.

How could the statute be plainer than it is?

The Court of Appeals granted the motion to dismiss upon the sole ground of want of jurisdiction. Obviously that learned Court can no more decline jurisdiction which it *does possess* than it can assume jurisdiction which it *does not possess.*

Its clear duty was to hear and determine the appeal on the merits.

Counsel for respondent in support of their argument have twice cited 8 Remington on Bankruptcy 323, to the effect that there must be a "definitive determination of rights" in order to make an interlocutory order appealable.

We beg leave to quote the actual language of Remington, emphasizing its most significant statement:

> "The original provisions of Sections 24-25 of the 1898 bankruptcy act were quite at variance from the present form. It contemplated possible use of a writ of error or of certiorari, as well as appeals in equity; were so phrased as to indicate a distinction between; 'controversies arising in bankruptcy' and 'bankruptcy proceedings'; and the only expressly appealable orders were (1) a judgment adjudging bankruptcy, (2) a judgment granting or giving a discharge, and (3) a judgment allowing or rejecting a claim of $500 or more. To state that this left things in considerable doubt and uncertainty reflects polite restraint in the use of stronger terms. In certain respects, some of the older decisions still have value, but the majority of them, since the 1926 and 1938 amendment of the sections herein involved, are worthless. It can be said now that appeal lies from *any* order, either interlocutory or final, whether entered in a 'controversy arising in bankruptcy,' or in a 'bankruptcy proceeding,' by which the appellant is aggrieved. *There is no longer any doubt about the appealability of the various and sundry intermediate or interlocutory orders*

in the course of bankruptcy administration, provided they have actual significance."

It thus clearly appears from the language of the learned author that the statute as amended in 1938 draws no distinctions between proceedings in bankruptcy and controversies arising in proceedings in bankruptcy.

Moreover, commencing at page 26 of the petition for certiorari, petitioner has listed almost a score of decisions in which, since the amendment of the statute, the circuit courts of appeals have held interlocutory orders appealable or entertained appeals therefrom. The only note taken of these decisions by respondent is to argue that in each case the order appealed from was made in a proceeding in bankruptcy and not to a controversy arising in a proceeding in bankruptcy. Under the plain provisions of the statute and the authorities which petitioner has cited both here and in his petition, it matters not one whit whether the interlocutory order appealed from was made in a *proceeding* or in a *controversy*.

II.

THE STATEMENT IN RESPONDENT'S BRIEF THAT THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION INVOLVED IS INACCURATE.

Under this heading in his brief respondent cites certain decisions, one of which, *Pearson v. Higgins,* 34 Fed.(2d) 27, is by the Ninth Circuit itself. Petitioner did not erroneously criticize that decision as respondent states at page 13 of his brief. It was written by

the late Judge Dietrich, an accurate and scholarly judge for whom we had the highest respect. Under the law as it stood at that time, the decision was correct. But the case was decided prior to the amendment of 1938 which invests the Courts of Appeals with appellate jurisdiction from interlocutory orders. It is no longer the law. Our criticism of *Goldie v. Carr,* 130 Fed. (2d) 335, and *In Re Christ's Church of the Golden Rule,* 172 Fed. (2d) 523, is that each of these cases ignores the change in the statute.

The decision of the Court of Appeals in the case at bar is certainly at variance with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Arkansas Corporation Commission v. Thompson,* 116 Fed. (2d) 179; of the Second Circuit in *Cohen v. Eleven West 42nd Street, Inc.,* 115 Fed. (2d) 531; and of the Fourth Circuit in *Columbia Foundry Co. v. Lochner,* 179 Fed. (2d) 630, 14 A.L.R. (2d) 1349.

In the case last cited, the Court uses language extremely pertinent in the case at bar:

> "However, even prior to the enactment of Section 24, sub a, *an interlocutory order overruling an objection to jurisdiction had been held appealable. In re Margolies,* 2 Cir. 266 F 203; see *In re Hotel Governor Clinton, Inc.,* 2 Cir. 107 F 2d 398, 399. It is our view that in consideration of the importance of the question involved, the appeal in this case should be entertained, and the motion to dismiss is therefore denied."

This brings us to the question of jurisdiction of the Bankruptcy Court.

III.

THE WRIT SHOULD BE GRANTED FOR THE REASON THAT UNDER A LONG LINE OF DECISIONS NEITHER THE REFEREE NOR THE DISTRICT COURT HAD ANY JURISDICTION TO MAKE THE TURN-OVER ORDER SOUGHT BY THE REFEREE.

The rule is well established by a long line of decisions that a bankruptcy court has no jurisdiction to make a turn-over order where the property is not in the possession, actual or constructive, of the Court itself because the third party "has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.'"

Cline v. Kaplan, 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97.

See to the same effect:

Galbraith v. Vallely, 256 U.S. 46, 41 S.Ct. 415, 65 L.Ed 823;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770.

A turn-over order cannot be issued to recover damages—the precise thing which the trustee is endeavoring to do in the case at bar.

Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 82 L.Ed. 476.

We once more direct attention to the forthright statement of the injustice and absurdity of such a proceeding by the Circuit Court of Appeals of the Second Circuit in the case of *In re Luma Camera Service,* 157 Fed. (2d) 951.

As stated by Judge Soper in *Columbia Foundry Co. v. Lochner,* supra, an order overruling an objection to jurisdiction had been held appealable even prior to the amendment of 1938.

It is highly significant that respondent utterly ignores these decisions, all of which are cited in the petition.

CONCLUSION.

It is submitted that the brief for respondent signally fails to answer any of the contentions raised by petitioner, and that in furtherance of justice, to uphold the right of appeal granted by the plain provisions of the statute, and to prevent the unjust harassment of the petitioner by prolonged and expensive proceedings which the bankruptcy Court has no jurisdiction to institute, the petition should be granted and the judgment of the Court of Appeals reversed.

Dated, San Francisco, California,
December 10, 1956.

MORRIS TRIEBER,
Petitioner in Propria Persona.

JOSEPH A. BROWN,
Of Counsel.